IN THE HIGH COURT OF SOUTH AFRICA
(BISHO)

CASE NO: 626/07

In the matter between:

DEON JUDE SWARTZ Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE 1st Respondent

THE HEAD OF THE DEPARTMENT,
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE 2nd Respondent

JUDGMENT

SANGONI J:

[1] The applicant is employed by the Department of Education of the Province of the Eastern Cape (department) as an educator in terms of the Employment of Educators Act of 1998. As from the year 2000 he got employed by the department as an educational

psychologist as well. As educational psychologist, he was also permitted to do remunerative work outside the ambit of his employment as a civil servant. The services he rendered as a psychologist in the course of his private practice related to the assessment of learners with special education needs for placement at specialised schools. He would then submit his recommendations and his findings, to the department for them to be processed. What the process entails will be dealt with later in this judgment.

[2] The relief sought is against the Member of the Executive for the department (MEC) as the first respondent as well as the head of the department, cited as the second respondent.

[3] The dispute between the parties relates to the refusal by the department to consider or give recognition to the assessments and resultant recommendations made by the applicant referred to in paragraph 1 above. What creates the duty, if any, on the respondents to consider or give recognition to such assessments and recommendations has not been clearly set out. I will address this later.

[4] The order sought in terms of the notice of motion is in the following terms:

"1. Directing that the administrative action of the Department of Education Eastern Cape Province;

1.1 In failing to consider and /or approve the assessment, diagnosis, clinical interventions and recommendations made by the applicant in his capacity as an Educational Psychologist, for the placement of learners at appropriate schools for learners with special education needs.("LSEN") on account of the applicant allegedly suffering from mental, emotional, physiological, pharmacological or substance abuse;

1.2 In wrongfully and unlawfully characterising the Applicant as an Educational Psychologist who does not subscribe to or conform with or satisfy the **ETHICAL CODE OF PROFESSIONAL CONDUCT** as published by the Professional Board of Psychology of the Health Professions Council of South Africa, as envisaged in item 5.1 of such code;

1.3 In failing to accept the results of the Applicant's professional services rendered as a Professional Educational Psychologist;

be judicially reviewed in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000, and set aside, alternatively, declared unlawful.

2. Interdicting and restraining the Department of Education Eastern Cape Province from alleging or recording that the Applicant suffers from mental, emotional, physiological, pharmacological condition or from substance abuse.

3. Directing that the Department of Education Eastern Cape Province consider and/or approve the clinical assessments, diagnoses, clinical interventions and recommendations hitherto made and henceforth to be made by the Applicant in his capacity as a Professional Educational Psychologist, for the placement or otherwise of learners at appropriate schools for learners with Special Education Needs.

4. Directing that the 180 day period referred to in Section 9 of the Promotion of Administrative Justice Act 3 of 2000, be extended to the extent necessary, on the basis that the interest of justice so dictate.

5. Granting further and/or alternative relief;

6. Directing that the Respondents pay the Applicant's costs of suit, jointly and severally, the one paying, the other to be absolved."

[5] It will be observed that in the first part of the relief sought, contained in paragraph 1 of the notice of motion, respondent seeks judicial review of the decision of the respondent relating to the way it dealt with assessments, diagnoses, recommendations etc by the applicant in his capacity as Educational Psychologist in private practice. For this part the applicant relies on the provisions of Promotion of Administrative Justice Act (PAJA).

[6] What appears to have sparked these proceedings is a letter addressed by one Mr de Lange, an official of the department, to the

applicant on 5 February 2007. The following is an extract from that letter:

> "Since your illness is of such severity that you are deemed unfit for work by a specialist psychiatrist for a full term in addition to the period you already were off duty during 2006, I must inform you that I will, and have already, refused to accept any assessment results on learners from assessments performed by you during your period of sick leave. You will, therefore, have to accept accountability for any action that schools or parents may take following the rejection of such test results. You will understand that I am ethically bound to act responsibly with information of a psychological nature which may influence decisions regarding a learner's scholastic career."

[7] The facts are that the applicant, in his capacity as the educational psychologist in the course of his employment by the department, was booked off from work on medical grounds for the full term. Doctor Taylor who apparently examined the applicant, diagnosed that he was suffering from depression and generalised anxiety disorder. Central to the defence of the respondents is the assumption that a psychologist suffering from pathological sickness is not entitled to make psychological assessments, diagnoses, clinical interventions and recommendations in the field of psychology as regards other people while he/she is himself/herself sick. For this the department relies on clause 1.5.1 of the Ethical Code of Professional Conduct issued by the Professional Board for

Psychology Health Professions Council of South Africa which stipulates that "psychologists shall refrain from undertaking professional activities when there is the likelihood that their personal circumstances (including mental, emotional, physiological, pharmacological, or substance abuse conditions) may prevent them from performing such professional activities in a competent manner".

[8] It is common cause that the prerequisite for the PAJA to apply is that the conduct complained of constitutes an administrative action. The first hurdle to examine is whether the conduct complained of constitutes an administrative action. It is apposite to refer to the words used in *President of the RSA v South African Rugby Football Union.*[1]

> "In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."

[1] 2000 (1) SA 1 (CC) P67 Paragraph 141

[9] In *Chirwa v Transnet Limited and others*[2] Ngcobo J, dealing specifically with the characterisation of a conduct as administrative action, referred with approval to the *SARFU*[3] judgment. The relevant extract is as follows:

> "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of power constitutes administrative action for the purpose of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33."

[10] As mentioned in *SARFU* above the source of the power, though not decisive, is a relevant factor in considering whether the action is administrative or not. The conduct complained of was performed in the exercise of an official duty more particularly as regards the relief referred to in subparagraphs 1.1 and 1.3 of the notice of

---

[2] 2008 (3) BCLR 251 (CC) P 295 Par 141
[3] Paragraph 143

motion. Subparagraph 1.2 concerns the analysis of the conduct complained of not necessarily what was expressed or implied by Mr de Lange. It relates to the services the applicant renders in his private practice, strictly speaking to the learners and their parents. It is common cause that the dispute in this matter has not arisen from the employment relationship the applicant has with the department. The subject matter of the dispute is that the department refuses to accept and process any assessment results on learner from the assessments made by the applicant. It is not immediately clear from the papers what the source and the nature of the power is. It can however be gleaned from the facts that the department has a role to play towards the placement of learners at public schools by processing assessment results on learners by the educational psychologists, including the applicant.

[11] This kind of situation begs the question as to whether the department has a contractual obligation or statutory obligation or some other kind of obligation to process the assessment findings made by the applicant towards the placement of the learners at various schools. The applicant claims he was acting as a service provider and the respondent responsible for payment for his services using the basic accounting system (BAS) method. This

still does not precisely explain the nature of the relationship between the respondent and the applicant. If the relationship is contractual, one would consider whether the conduct of the department, if found to be true, does not constitute a breach of a contractual obligation, which would not be competent for judicial review.

[12] It is however apparent that the power exercised by the respondent in refusing to give recognition to the applicant's assessments and findings, declining to give effect to his recommendations, on the basis that the applicant should refrain from undertaking professional activities, does not emanate from a contractual relationship but from the exercise of power by a state organ.

[13] It is the responsibility of the Ministry of Education and thus the department to ensure that all learners, with or without disabilities, pursue their learning potential to the fullest. The services rendered by the applicant would entail compiling an assessment report on the learners, in which he would *inter alia* recommend that the learner be placed to a special school. That report would then be submitted to the department for further consideration and recommendation by the department together with a panel of psychologists. To refuse to

consider the reports is tantamount to a violation of a statutory obligation. I conclude therefore that the action that forms the subject matter of the relief in para 1.1 and 1.3 in the notice of motion constitutes an administrative action.

[14] Such action is not disputed by the respondent. The department has taken what it considers a "principled stance that it shall not consider nor shall it approve of the assessments, diagnoses, clinical instructions and/or recommendations made by the applicant" made for purposes of placing learners at appropriate schools. The reason given, as alluded to above, is that the applicant is sick himself and in terms of the ethical code should refrain from undertaking professional activities during the period of his sick leave.

[15] Even if the view held by the respondent is correct it lends no justification to his action to simply refuse to act on his professional work without obtaining authority and obtaining confirmation of his view either from the Professional Board of Psychology or some other competent body as regards the competency of the applicant. That would be after hearing the applicant's side of the story. In the given situation, even though Mr de Lange is a qualified educational psychologist, he does not profess to be suitably qualified and

competent to make the pronouncement only on the basis of the medical report he received and which relates to a different scenario. The department could have raised its concerns at a meeting with the other psychologists in the course of the panel's consideration of the reports instead of simply discarding the reports of the applicant. I am satisfied that a case has been made in terms of subparagraphs 1.1, 1.3 as well as paragraph 3 of the notice of motion for judicial intervention.

[16] In paragraph 2 of the notice of motion the applicant seeks an interdict restraining the respondent from alleging that the applicant "suffers from a mental emotional psychological pharmacological condition or from substance abuse".

[17] I agree with Mr Jozana, who appears on behalf of the respondent, that there is no factual foundation laid in the founding papers for such relief. The only reference to the conduct of the respondent in this respect is deduced from the averment made in paragraph 34 of the founding affidavit. In that paragraph the applicant reiterates that no body with competent authority found the applicant to be unfit to perform Educational Psychologist's functions and consequently, the applicant concludes that the respondent is

judgmental. By and large the allegation complained of constitutes the defence of the respondent. It would be inappropriate to rule that the respondent should be interdicted from making that averment for that purpose, for instance. Whatever was said by the respondent in this context, seems to have been an interpretation of what originated from the applicant in his application for leave and/or the medical doctor that attended to him.

[18] In essence an interdict is intended to prevent a party from proceeding with a certain cause of action against the applicant or a person on whose behalf the applicant is acting. In *Setlegelo vs Setlegelo*[4] it was held that for a final interdict there are three requisites to be met. They are a clear right, a continuing act of interference and an absence of an appropriate alternative remedy, the underlying principle being an unlawful action on the part of the person who is sought to be interdicted. The element of unlawfulness arguably incorporated in the first two requisites. As indicated above in this judgment the only averment made by the applicant against the respondent is in the context of a defence being advanced by the respondent against the allegations of impropriety directed at it. One is unable to read unlawfulness from this. The

[4] *Setlegelo vs Setlegelo* 1914 AD 221

other consideration is that it is apparent that there is no threat or understood threat that the respondent will continue to invade the rights (so to speak) of the applicant. An interdict is not a remedy for the past invasion.[5] This aspect of the application must therefore fail.

[19] I consider the application to be substantially successful and the applicant is entitled to costs therefore.

I thus make the following order:

1. The respondent is directed to consider the assessments, diagnosis, clinical interventions and recommendations and to process results of the applicant's professional services rendered as a professional educational psychologist, made by the applicant in his capacity as an educational psychologist, for the placement of learners at appropriate schools for learners with special educational needs.

2. Rule *nisi* granted in terms paragraphs 1.2 and 2 of the notice of motion is discharged.

---

[5] *Performing Right Society Ltd vs Berman and Another* 1966 (2) SA 355 (R) at 357

3. Respondent is ordered to pay costs of the application.

C T SANGONI
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff	:	Advocate SA Collett
Attorneys for the Plaintiff	:	Messrs Hutton & Cook King William's Town
Counsel for the Defendant	:	Advocate M Jozana
Attorneys for the Defendant	:	State Attorney East London
Date heard	:	20 May 2008
Date Judgment delivered	:	19 August 2008